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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-393

UNITED TRANSPORTATION UNION,
Petitioner,

v.

UNITED STATES OF AMERICA, and
ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

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INDEX

	Page
Prayer	1
Opinions below	1
Jurisdiction	2
Statutory provisions involved	2
Statement of the case	4
Questions presented	7
Reasons for granting the writ	8
Conclusion	14
Appendix A—Opinions of the Court of Appeals	A-1
Appendix B—Opinion of the District Court	A-27

Cases Cited

Brotherhood of Railroad Trainmen v. Howard (1952), 343 U.S. 768 ..... 5, 9

Chicago & N.W. Ry. Co. v. United Transportation Union (1971), 402 U.S. 570 9

Conley v. Gibson (1957), 355 U.S. 41 9

Griggs v. Duke Power Co. (1971), 401 U.S. 424 ....12, 13

Howard v. St.L.-S.F. Ry. Co. (8th Cir. 1951), 191 F.2d 442 5

Howard v. St.L.-S.F. Ry. Co. (8th Cir. 1954), 215 F.2d 690 5

Howard v. St.L.-S.F. Ry. Co. (E.D.Mo. 1965), 244 F. Supp. 1008 5

Howard v. St.L.-S.F. Ry. Co. (8th Cir. 1966), 361 F.2d 905, cert. den. 385 U.S. 986 ..... 5, 9

Howard v. Thompson (E.D.Mo. 1947), 72 F.Supp. 695 5

Norman v. Missouri Pacific Ry. Co. (1969), 414 F.2d 73 10

Steele v. Louisville & N. R. Co. (1944), 323 U.S. 192 9

U. S. v. Jacksonville Terminal Co. (1971), 451 F.2d 418, cert. den. April 24, 1972 10

Statutes Cited

28 U.S.C., § 1254(1) 2

42 U.S.C., § 2000e-2(h) 2, 12

42 U.S.C., § 2000-2(j) 3, 12

42 U.S.C., § 2000e-3(a) 4

42 U.S.C., § 2000-5(g) 3, 12

42 U.S.C., § 2000e-6 5

45 U.S.C., § 152 first 4, 8

45 U.S.C.A., § 151 et seq. 8

Congressional Record Cited

110 Cong. Rec. 6986 10

110 Cong. Rec. 6992-4 13

110 Cong. Rec. 6995-7 13

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PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

The Petitioner, United Transportation Union, as successor to the Brotherhood of Railroad Trainmen, respectfully prays that a writ of certiorari issue to review the judgment and opinions of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on June 13, 1972.

OPINIONS BELOW

The opinions of the Court of Appeals, not yet reported, appear in the Appendix hereto. The opinion of the District Court for the Eastern Division of the Eastern District of Missouri is reported at 52 FRD 276 and also appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on June 13, 1972 and this petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 USC § 1254(1).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 42 § 2000e-2(h)

Seniority or merit system; quantity or quality of production; ability tests; compensation based on sex and authorized by minimum wage provisions

(h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.

§ 2000e-2(j)

Preferential treatment not to be granted on account of existing number or percentage imbalance

(j) Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

Pub.L. 88–352, Title VII, § 703, July 2, 1964, 78 Stat. 255.

§ 2000e-5(g)

Injunctions; appropriate affirmative action; reinstatement, hiring, back pay; reduction of back pay by interim earnings or amount earnable; limitations on judicial orders

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may in-

clude reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice). Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex or national origin or in violation of section 2000e-3(a) of this title.

United States Code, Title 45
§ 152 First

General Duties

First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

STATEMENT OF THE CASE

This action was brought in the name of the United States, by the then Attorney General, against the St. Louis-San Francisco Railway Company (Frisco) and the

Brotherhood of Railroad Trainmen, predecessor of petitioner, under the authority of section 707 of the Civil Rights Act of 1964 (42 USCA § 2000e-6). Relief was sought under Title VII of the Civil Rights Act of 1964 for train porters employed by Frisco, and is a follow-on of earlier litigation involving the train porter-brakemen dispute brought under the Railway Labor Act.[1]

Train porters constituted a class of employees, all of whom are Negro, working exclusively on passenger trains (R 546, 651). They have existed as a separate craft on the Frisco since at least 1884 (R 649-650). The District Court found that their primary duty was the care and comfort of passengers (R 44, 48) but they also performed head-end braking duties when the occasion required (R 45, 48). Frisco discontinued passenger service in December 1967, terminating the employment of train porters (R 589). Frisco offered other employment to its furloughed train porters, waiving some of its normal requirements for new hires, but without carryover seniority (R 676-7). Some of them accepted employment as brakemen (R 586-9, 607).

Brakemen worked in both freight and passenger service, with those holding passenger assignments being senior men with extensive freight experience (R 456, 635). The characteristics of freight work stand in stark contrast to passenger work (R 635-6). In the yards, and in local freight and road switching, the work is largely outdoors, extremely hazardous, involving complex switching movements and long hours (R 151-4, 463-6, 536-7). In through freight, the length and weight of trains causes equipment

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[1] Prior reported decisions in the first Howard case include Howard v. Thompson (E.D.Mo. 1947), 72 F.Supp. 695; Howard v. St.L.-S.F. Ry. Co. (8th Cir. 1951), 191 F.2d 442; Brotherhood of Railroad Trainmen v. Howard (1952), 343 U.S. 768; Howard v. St.L.-S.F. Ry. Co. (8th Cir. 1954), 215 F.2d 690. The second Howard case is reported at Howard v. St.L.-S.F. Ry. Co. (E.D. Mo. 1965), 244 F.Supp. 1008; Howard v. St.L.-S.F. Ry. Co. (8th Cir. 1966), 361 F.2d 905, cert. den. 385 U.S. 986.

failures requiring on the spot repairs (R 620-2, 636-670), and since the crews work out of pools, the starting time for a crew is uncertain (R 544, 636-7). Passenger service was largely indoor work, with regular hours and virtually no equipment problems (R 635). The passenger brakeman, as flagman, was required by flagging rules to appear at the rear of the train every time it stopped (R 543-4). With the introduction of Centralized Traffic Control, and as a result of Arbitration Award 282 under Public Law 88-108 the flagging rules were changed, and most flagman positions were abolished (R 666-8).

Prior to 1928, Negroes were hired as brakemen. In that year an agreement between four train service organizations and Frisco prohibited the future employment of Negroes in train, engine and yard service except as train porters. This agreement was terminated in 1949, but the first employment of a Negro in those services appears to have been in 1963, when train porter Pogue was employed as a fireman (R 542, 694).

The District Court in a memorandum decision found that "the duties of a train porter and brakeman are essentially different" and that "the crafts of train porter and brakeman are based upon functional differentiations" (R 50). The Court also justified the separate craft classifications on the basis of business necessity, finding that train porters were not qualified by experience to perform the duties of freight brakemen with safety and efficiency (R 50). Judgment was entered for the defendants.

On appeal, a panel of the Court of Appeals, with one dissent, affirmed. The government's petition for rehearing in banc was sustained and following rehearing the District Court was reversed.[2] The majority held that the

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[2] The principal opinion by Judge Ross was joined in by none of the other judges, but four judges concurred in a separate opinion by Chief Judge Matthes. Two of the concurring judges dissented on the issue of back pay, while three judges dissented from the granting of any relief in two separate opinions.

failure to grant carryover seniority to train porters hired as brakemen violated Title VII of the Civil Rights Act of 1964. The relief ordered requires Frisco to offer employment as brakemen to all former train porters, to create and implement a training program, providing training for a period of not to exceed six months, with those former train porters who are then found to be qualified to receive seniority as brakemen for 100% of the time spent in training plus 50% of their former seniority as a train porter. Those former train porters now employed as brakemen are to receive 100% credit for time spent as a brakeman plus 50% of their time as a train porter. Back pay was denied.

QUESTIONS PRESENTED

1. Whether Title VII of the Civil Rights Act of 1964 can be construed and applied in utter disregard of the Railway Labor Act; specifically, whether the refusal of a carrier to grant Negro train porters retroactive seniority as brakemen, which refusal was required by labor agreements which the Railway Labor Act commands both the carrier and the union to "make and maintain", can constitute a violation of Title VII so as to justify judicial relief, where the separate classification of train porters rests on functional differentiations and where train porters are found not to be qualified by experience to perform the hazardous duties of freight brakemen with safety and efficiency.

2. Whether the fact that Negroes had not been hired as brakemen for a period of years prior to the effective date of Title VII of the Civil Rights Act of 1964 authorizes a court to grant to one group of Negroes, previously employed in the functionally distinguishable craft of train porter and who are wholly without experience in freight service, seniority rights as brakemen, which brakeman sen-

iority will be retroactive to dates prior to the effective date of Title VII, or whether such action constitutes preferential treatment and retroactive relief prohibited by the Act.

REASONS FOR GRANTING THE WRIT

I

In this action, the majority of the Court of Appeals, in granting relief under Title VII of the Civil Rights Act of 1964, grants retroactive seniority as brakemen to men formerly employed as train porters, a functionally different craft. Recognizing that train porters are not qualified by experience to perform the hazardous and demanding duties of freight brakemen, the decision requires a training period and then restricts the exercise of the seniority rights so granted by giving Frisco the power to exclude them from any duty they "should not perform for safety reasons." It thus reduces to a shambles the historical practices in the railroad industry, developed under the mandates of the Railway Labor Act (45 USCA, § 151 et seq.) and which can be related directly to safety and efficiency that are so vital to the industry, its employees and the public.

It is self evident that to justify relief under Title VII of the Civil Rights Act of 1964 there must be found to exist some violation of that Act. The only alleged violation found by the majority was "Frisco's refusal to accord the train porters any seniority" (p. 8, slip opinion). Totally ignored was the fact that that action was compelled by Frisco's statutory obligation under the Railway Labor Act "to make and maintain agreements concerning rates of pay, rules, and working conditions" (45 USCA, § 152, First, R. 653-5). That this command is not merely a statement of policy but imposes a judicially enforceable legal obligation binding on both the carrier and the union

was settled in Chicago & N.W. Ry. Co. v. United Transportation Union (1971), 402 U.S. 570.

Neither could petitioner, as craft representative of brakemen, accede to the carryover of seniority earned in a functionally distinguishable craft. Charged with the statutory duty to fairly represent the members of the craft of brakemen without discrimination on account of race, it could not sacrifice the seniority rights of brakemen to the demands of train porters, a separately organized craft, who were totally without experience in freight service and who have been granted relief in this action solely on the basis of race.

We thus are faced with the anomalous situation that action required by statutory mandate under the Railway Labor Act is held to constitute a violation of Title VII of the Civil Rights Act of 1964. This result was reached without any consideration being given to the Railway Labor Act, and without any apparent understanding of the differences between the railroad industry and general industry in both legislative treatment and historical practices.[3]

That Title VII was not intended to obliterate the commands of the Railway Labor Act is evidenced by the legislative history of the Civil Rights Act. In the Senate debate on Title VII, Senator Clark, one of the floor managers of the bill, introduced into the record a statement prepared for him by the Justice Department, containing the following:

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[3] Courts are without jurisdiction to tamper with the craft structure under the Railway Labor Act, as was determined in prior litigation involving this very dispute. Brotherhood of Railroad Trainmen v. Howard (1952), 343 U.S. 768; Howard v. St. L.-S.F. Ry. (8th Cir. 1966), 361 F.2d 905, cert. den. 385 U.S. 986; and racial discrimination is of course prohibited by the Railway Labor Act, as is evidenced by a long line of cases commencing with Steele v. Louisville & N. R. Co. (1944), 323 U.S. 192, and including, among others, the decision of this Court in Brotherhood v. Howard and Conley v. Gibson (1957), 355 U.S. 41.

> "At any rate, title VII would have no effect on the duties of any employer or labor organization under the NLRA or under the Railway Labor Act, and those duties would continue to be enforced as they now are." 110 Cong. Rec. 6986.

It is clear that Title VII can be construed in accommodation with the Railway Labor Act. In fact, this was done in an earlier panel decision of the 8th Circuit, only one judge of which panel sat in this case. In Norman v. Missouri Pacific Ry. Co. (1969), 414 F.2d 73, involving a similar train porter-brakeman dispute on the Missouri Pacific, it was held that if the classification of train porter was a racial counterpart of brakeman, Title VII would operate to grant relief; but if that classification was based on "functional differentiations", the Railway Labor Act would apply. The Norman case is not even mentioned in the opinions below even though petitioner relied heavily upon it and the District Court followed its guidelines in reaching its decision.

Had the guidelines of Norman been followed, the result below would not have been possible and the District Court would have been affirmed. Instead, the majority chose to ignore its own prior decision as well as the Railway Labor Act. In so doing, it has opened the door to great mischief in a very sensitive area, and has decided an important question of federal law which has not, but should be, settled by this court.[4]

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[4] In the only other appellate decision applying Title VII to the railroad industry, the 5th Circuit in U.S. v. Jacksonville Terminal Co. (1971), 451 F.2d 418, cert. den. April 24, 1972, expressly limited the effects of its decision in this language: "It should be self-evident that our decision with respect to seniority rights and transfer and promotion restrictions applies only to their use at this single facility, not to the whole railroad world." 451 F.2d at 455. No such limitation is discernible in the decision here.

II

The sole reason assigned by the majority below for granting relief in this case is the fact that for a number of years prior to the effective date of Title VII of the Civil Rights Act of 1964, Frisco did not hire Negroes as brakemen. Since that time, neither Frisco nor petitioner is charged with any discriminatory acts excepting only the allegation that the refusal to recognize carry-over seniority to train porters violates the Act (R. 548-550).

The Pre-Act exclusionary practice had its origin in a 1928 agreement, which was terminated in 1949, under which the hiring of Negroes in train, engine and yard service, except as train porters, was prohibited (R. 542). Negroes as a class were thus excluded from employment, but train porters, whose existence as a separate craft is traced in this record back to 1884, were not affected.[5] Prior to 1928, Negroes were hired as brakemen and these continued in service, the government admitting that at all times since at least 1917 there have been Negroes employed as brakemen on the Frisco (R. 548). It is not open to dispute that "train porter" was a functional classification, the duties of the craft being essentially different from those of brakemen, as the District Court found.

The decision below provides preferential treatment for one group of Negroes, the train porters, solely because all Negroes were for a time excluded from employment as brakemen.[6] We contend that this relief is in clear violation of Title VII of the Civil Rights Act of 1964.

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[5] The majority below erred in stating that under federal control during World War I the crafts of train porter and brakeman were merged. The pay of train porters was equalized with that of passenger brakemen, but Frisco continued to carry them as a separate craft (R. 763, 813-4).

[6] The theory of the majority below was that train porters would have preferred employment as brakemen if that were

In the only decision to date by this court involving non-procedural issues of racial discrimination under Title VII it was said in Griggs v. Duke Power Co. (1971), 401 U.S. 424 at 431:

> "Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification."

Turning to the Act, sec. 703(h) excepts from the operation of Title VII differences in pay and other conditions of employment "pursuant to a bona fide seniority or merit system." 42 USCA § 2000e-2(h).

Sec. 703(j) provides that nothing contained in Title VII shall require "preferential treatment to any individual or to any group" because of race or color. 42 USCA § 2000e-2(j).

Sec. 706(g) dealing with the scope of judicial relief authorized under Title VII excludes relief where the acts complained of occurred "for any reason other than discrimination on account of race, color • • • in violation of section 704(a)". 42 USCA § 2000e-5(g).

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available, a conclusion that, of necessity, is wholly speculative. Judge Van Oosterhout, in dissent, found "no substantial evidence that any of the train porters applied for or were denied brakemen's positions" (p. 26, slip opinion). Prior to 1928, with a choice of jobs available, many Negroes accepted employment as train porters. Simon Howard, employed originally as a freight brakeman, transferred to train porter at his own request (R. 545-6). Pogue, after one student trip as a brakeman in 1965, went back to working as a train porter (R. 694-5). Bagley, who admitted he would still be working as a train porter if passenger service had not terminated, turned down a braking job because "it would have just been a death trap for me" (R. 196-7, 199-200).

In Griggs v. Duke Power Co., supra, the court gave great weight to the Senate debates on Title VII in arriving at its proper construction. Turning to those debates establishes that the relief provided by the majority below is far beyond the proper scope of judicial authority.

An interpretative memorandum prepared by Senators Clark and Case, floor managers of the bill, contains the following statement:

> "Title VII would have no effect on established seniority rights. Its effect is prospective and not retrospective. Thus, for example, if a business has been discriminating in the past and as a result has an all-white working force, when the title comes into effect the employer's obligation would be simply to fill future vacancies on a nondiscriminatory basis. He would not be obliged—or indeed, permitted—to fire whites in order to hire Negroes, or to prefer Negroes for future vacancies, or, once Negroes are hired, to give them special seniority rights at the expense of the white workers hired earlier." 110 Cong. Rec. 6992-4.

In response to questions submitted by Senator Dirksen, Senator Clark prepared answers, one of which is the following:

> "Question. If an employer is directed to abolish his employment list because of discrimination, what happens to seniority?
>
> "Answer. The bill is not retroactive, and it will not require an employer to change existing seniority lists."
>
> 110 Cong. Rec. 6995-7.

Looking to the Act, its legislative history, and the decision of this court in Griggs, establishes, we believe, that the decision below is an impermissible exercise of judicial authority in the following respects:

It requires a change in seniority rosters to give retroactive seniority as brakemen to train porters, seniority which will in fact extend back long prior to the effective date of Title VII.

It nullifies a bona fide seniority system, one that is based on functional differentiations and business necessity, in the overriding importance of safety and efficiency in the inherently dangerous business of train operations.

It gives preferential treatment to one group of Negroes, solely because of race, where the only act complained of, the refusal to grant carry-over seniority to that group, occurred for reasons wholly unrelated to race.

CONCLUSION

For the reasons aforesaid, a Writ of Certiorari should issue to review the judgment and opinions of the Court of Appeals for the Eighth Circuit.

Respectfully submitted

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APPENDIX A

United States Court of Appeals
For the Eighth Circuit

No. 71-1247

United States of America,
Appellant,

vs.

St. Louis-San Francisco Railway Company and United Transportation Union, Successor to Brotherhood of Railroad Trainmen,
Appellees.

} Appeal from the United States District Court for the Eastern District of Missouri.

Submitted: May 8, 1972.

Filed: June 13, 1792.

Before MATTHES, Chief Judge, VAN OOSTERHOUT, MEHAFFY, LAY, HEANEY, BRIGHT, ROSS and STEPHENSON, Circuit Judges.

Ross, Circuit Judge.

This is an action brought by the United States charging St. Louis-San Francisco Railway Company (Frisco) and United Transportation Union (UTU), successor to the Brotherhood of Railroad Trainmen (BRT), with having

engaged in a policy and practice of discrimination on account of race, in their dealings with black train porters formerly employed by Frisco, in violation of Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.).[1] The Government seeks to have Frisco reclassify the former train porters as brakemen, and, by a merger of these two crafts, allow them to claim seniority accumulated as train porters in their new classification.

The trial court denied the request of the Government for a merger of the crafts and dismissed the action. *United States* v. *St. Louis-San Francisco Railway Co.*, 52 F.R.D. 276 (E.D. Mo. 1971). On appeal to this Court, a majority of the panel, which heard the case, affirmed on the basis of the opinion of the trial court. *United States* v. *St. Louis-San Francisco Railway Co.*, No. 71-1247 (8th Cir. Feb. 22, 1972). The United States filed a petition for rehearing *en banc*, and it was granted. Upon rehearing *en banc*, we reverse and remand for further proceedings consistent with the views expressed in this opinion.

The essence of the claim of the United States is that from 1928 to 1966 Frisco discriminated against blacks in its hiring practices relating to brakemen; that black applicants for jobs with Frisco were forced to accept the lower paying job of train porter; that train porters performed head-end braking duties as well as duties relating to passenger care and maintenance on passenger trains; that when pasenger trains were discontinued by Frisco,

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[1] This is the latest in a series of cases involving essentially the same parties. *Howard* v. *Thompson*, 72 F. Supp. 695 (E.D. Mo. 1947); *rev'd*, 191 F.2d 442 (8 Cir. 1951), *aff'd*, 343 U.S. 768 (1952); *Howard* v. *St. Louis-San Francisco Railway Co.*, 215 F.2d 690 (8 Cir. 1954); *Howard* v. *St. Louis-San Francisco Railway Co.*, 244 F.Supp. 1008 (E.D. Mo. 1965), *aff'd*, 361 F.2d 905 (8 Cir.), *cert. denied*, 385 U.S. 986 (1966). However, this is the first action instituted subsequent to the enactment of the Civil Rights Act of 1964. Moreover, it is the first case to consider the distinction between the duties of the train porter and the *freight* brakeman.

passenger brakemen were allowed to carry over all of their seniority to freight braking jobs; that even though train porters performed braking duties a substantial portion of the time they spent as train porters, they were not permitted to carry over any seniority to freight braking, but were required to start at the bottom of the seniority ladder; and that this denial of carryover seniority was a present discriminatory effect of past discrimination, preserved by an otherwise neutral current employment policy, which should be remedied under the Civil Rights Act of 1964.

The craft of train porter[2] had been recognized by Frisco since at least December, 1918; and it had been organized and represented for collective bargaining purposes since 1921.[3] It had always been filled solely by blacks, and the black train porters were always paid lower wages than brakemen, except for a period during and shortly after World War I, when the railroads were under federal control and the crafts of train porter and brakeman were merged. Train porters and brakemen were always represented by separate bargaining units.

In 1928, Frisco and the BRT, which represented the brakemen, negotiated a collective bargaining agreement, which provided that "in the future hiring of employees in train, engine, and yard service but not including Train Porters, only white men shall be employed."[4] Although this

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[2] Train porters should not be confused with chair car porters, who were paid less and whose job included no braking duties.

[3] *Howard* v. *St. Louis-San Francisco Railway Co., supra,* 361 F.2d at 907. In this litigation, Frisco presented evidence to show that some train porters had entered service as early as 1884.

[4] The depositions taken from those black train porters who initiated their employment during the period this provision was in force attest to the fact that it was applied strictly on racial grounds. Train porter Edwards, who apparently asked for a brakeman's job shortly after the contract was initiated, was told

agreement was rescinded in 1949, no black person was hired as a brakeman until 1966, with one exception.[5] Yet, during this period from 1949 until 1965, at least 750 white brakemen were employed by Frisco at the entry level. From 1966 until June, 1970, 63 black brakemen and switchmen were hired.[6]

Train porters assisted passengers, handled baggage, kept coaches clean, and performed head-end braking duties exclusively on passenger trains. The rear-end braking duties on the passenger train, as well as braking duties on both ends of freight trains, were performed by brakemen. The Government insists that throughout the period in question, train porters were relegated to that craft simply because of their race, and that this is borne out by the fact they performed essentially the same functions as the passenger brakeman.

Evidence given by individuals who had been train porters with Frisco revealed that their braking duties consisted of flagging blocks, throwing switches, watching for

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that he could not be hired as a brakeman. Adams, who in 1936 applied for a trainman job on the front end of a passenger train, stated that he did not apply for a brakeman's job because he was told that as a Negro he could not have been hired. And Nichols, Tennon, and Falls, all of whom applied for jobs as train porters in 1942, did so because they knew that Frisco was not hiring blacks as brakemen. Nichols specifically stated that he would have preferred a job as brakeman.

[5] The one exception was train porter Pogue, who applied for and was accepted as a fireman in 1963. When that position was eliminated, Pogue exercised his seniority as a train porter, and continued in that capacity until April, 1964, at which time he applied for and was accepted as a brakeman. However, after one student trip, he elected to revert to train porter, in which capacity he continued until passenger service was discontinued in 1967. At that time, he reapplied for and was again accepted as a brakeman.

[6] A listing of these individuals was tendered by Frisco on June 5, 1970, in response to an interrogatory by the Government requesting the name, present job, and date of initial employment of each Negro who was employed as a "brakeman, conductor, switchman or switchman-foreman by the defendant Frisco."

and repairing "hot boxes," setting out and picking up cars, setting and unsetting hand brakes, replacing broken knuckles (train couplings), coupling and uncoupling air and steam hoses, giving hand signals, using and maintaining lanterns, fusees, and other signaling equipment, receiving and carrying out orders, and otherwise assisting the conductor. Witnesses for the defendants acknowledged that the train porters did in fact perform these duties. There is, however, disagreement as to what percentage these braking duties assumed in the train porter's total work shift;[7] the trial court found that the train porter's "primary" duty was to assist and care for the train passenger.[8]

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[7] In 1951, Judge Johnsen, writing for the Court in *Howard* v. *St. Louis-San Francisco Ry. Co.*, 191 F.2d 442, 444 (8th Cir. 1951), *aff'd*, 343 U.S. 768 (1952), found that their duties in aisle-sweeping and passenger-assisting were merely incidental, occupying only approximately five percent of their time. He found that "it is plain that the position of train porter has had existence only because of the braking duties attached to it and that only because it has made necessary the establishing of a head-end brakeman's position on such trains has it had a 40-year survival. . . ." Many of the train porters, in this case, stated in their depositions that they felt ninety-five percent of their duties consisted of braking duties. Defense witnesses, including one black brakeman who was formerly a train porter, indicated that braking duties occupied only ten percent to twenty percent of the train porter's time. And one Government witness, Nathaniel Adams, indicated that forty percent of the train porter's duties related to baggage handling, maintenance and passenger care.

[8] The trial court summarized the duties of a train porter, from the deposition of a former train porter, as follows:

> "Looked after and checked on the lighting, heating and air-conditioning on passenger trains; kept up the general appearance of the passenger coaches by picking up debris, bottles, cups, and sweeping the aisles and under the seats; assisted passengers boarding and departing from trains; helped passengers with their baggage, called out train stations, advised them with respect to making connections, and answered any remaining questions the passengers might have; picked up hatchecks for the passengers; sold pillows to the passengers; kept the restrooms on the passenger trains clean; and checked for items the passengers may have left behind after the passengers departed the train." *United States* v. *St. Louis-San Francisco Railway Co.*, *supra*, 52 F.R.D. at 281.

Regardless of what was considered the train porter's primary duty, Frisco and UTU argue that the braking duties performed by train porters were significantly different from those performed by freight brakemen, and that on this basis there exists a functional distinction. The duties of freight brakeman include working in local freight, yard switching, and through freight, which involves "kicking" and "dropping" cars, where a car, moving under its own momentum, is controlled by the brakeman using a handbrake. A freight brakeman is also responsible for loading and unloading goods, switching, inspecting for equipment failures, and making necessary repairs. Many of these jobs involve long shifts, under hazardous conditions and in all types of weather. Some of the train porters stated, in their depositions, that they observed these freight duties while deadheading (riding to or from their starting or termination point) on freights, and that thereby they were acquainted with most of the duties.

Although a brakeman had a right to bid on any job, the usual progression was through the more dangerous and arduous freight service to the easier, high-priority passenger service, where the majority of the brakeman's time was spent riding. The entry level of the brakeman's craft is yard work. From there a brakeman generally progresses through local freight, through freight, and finally he will then bid on a position as conductor or, prior to 1967, as a rear-end brakeman on passenger trains. There is, however, no set job progression; if a brakeman had so elected, prior to 1967, he could have remained in yard work or local freight until he accumulated enough seniority to become a conductor or a passenger brakeman. By union contract, the assignment of all brakemen was done through bidding, based upon seniority as a brakeman. When a brakeman became a conductor he retained his seniority as a brakeman in case he wanted to give up his conductor classification and return to braking.

Passenger service was discontinued by Frisco in 1967. Consequently, the position of train porter was abolished and all of the black train porters were displaced.[9] Frisco did, however, offer those train porters, who were still in service and who did not choose to retire, positions in other crafts; but less than half of that number accepted, because none were allowed to retain any of the seniority they had acquired as train porters.

After consideration of these facts, the trial judge dismissed the action and entered judgment for the defendants upon two basic findings. First, he concluded that the crafts of train porter and brakeman were distinct in that they were based upon functional differentiations, and that thereby train porters were not qualified to perform as freight brakemen. This finding was based upon testimony by defendants' witnesses that the train porter's primary function was that of looking after passengers, and that any braking was merely incidental. Second, he specifically found that the train porters had not been discriminated against since the enactment of the Civil Rights Act of 1964, and that therefore, no remedy was justified. He found that the train porters had been accorded adequate relief in the form of an offer of job preference as brakeman, but without carryover seniority, and that this was the only affirmative relief possible to remove the taint of past racial discrimination.

A majority of the original panel, of this Court, in affirming the trial court's decision on the basis of his opinion, stressed the applicability of the "business necessity" doctrine and that seniority carryover could occur only at the

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[9] As of July 2, 1965, the effective date of Title VII of the Civil Rights Act of 1964, there were fifty-six train porters listed on nine different rosters, which rosters were made up for each of the geographic subdivisions of Frisco. Of this number, four had retired pursuant to the disability provision of the Railroad Retirement Act. Thus, the Government now claims that the class of train porters entitled to relief consists of fifty-two.

expense of safety and efficiency. On rehearing, neither the Government nor the defendants suggested any new alternative remedies that would adequately protect safety and efficiency and, at the same time, relieve the train porters of the continuing effects of past discrimination. The alternative recommended by the Government, which was urged by it and considered by the panel earlier, would accord qualified train porters full seniority carryover in bidding on future vacancies as brakemen. Thus, the only difference in that remedy from a complete merger of crafts is that there could be no displacement of incumbent brakemen; rather, advancement would be possible only when a vacancy occurs. The net long term effect of both, however, is the same.

We are convinced that a remedy is justified and that it is not impossible to fashion. First of all, it is clear there was overt racial discrimination prior to the enactment of the Civil Rights Act of 1964, and that the continuing effect of that past discrimination perpetuates itself in Frisco's refusal to accord the train porters any seniority. Second, the business necessity doctrine does not bar relief where an acceptable remedy provides adequate safeguards for safety and efficiency. And third, there is an acceptable remedy in this case.

PRESENT EFFECTS OF PAST DISCRIMINATION

The facts disclosed by the record in this case, as set forth above, lead us to the inescapable conclusion that Frisco systematically discriminated against blacks in hiring new brakemen from 1928 until 1966. During the first twenty-one years of that period, a written agreement existed between Frisco and the BRT which absolutely precluded the hiring of black brakemen by Frisco. From 1949 to 1966, out of over 750 newly hired brakemen, only

one was black. Although the record does not contain specific evidence of the refusal of Frisco to hire blacks during this period subsequent to the rescission of the restrictive agreement in 1949, these statistics demonstrate just as effectively as the testimony of a witness that Frisco and the BRT systematically excluded blacks in hiring new brakemen. *See Arkansas Education Association* v. *Board of Education*, 446 F.2d 763, 770 n.4 (8th Cir. 1971); *Bing* v. *Roadway Express, Inc.*, 444 F.2d 687, 689 (5th Cir. 1971); *Marquez* v. *Omaha District Sales Office, Ford Division of Ford Motor Co.*, 440 F.2d 1157, 1160-1161 (8th Cir. 1971); *Parham* v. *Southwestern Bell Telephone Co.*, 433 F.2d 421, 426 (8th Cir. 1970); *Jones* v. *Lee Way Motor Freight, Inc.*, 431 F.2d 245, 247 (10th Cir. 1970); *United States* v. *Sheet Metal Workers Int'l Ass'n, Local 36*, 416 F.2d 123, 127 n.7 (8th Cir. 1969). This conclusion is further strengthened by the disclosure that sixty-three blacks were hired as brakemen from 1966 to 1970, including at least five former porters. Obviously the passage of the Civil Rights Act of 1964 had an effect on the hiring practices of Frisco and the acceptance of those revised hiring practices by the BRT.

Even though Frisco adopted nondiscriminatory employment practices after the effective date of Title VII of the Civil Rights Act of 1964, the effects of its past discrimination carried over under the craft seniority system, especially after the discontinuance of its passenger service in 1967. At that time, the white brakemen on passenger trains were able to use their seniority accumulated in passenger service to bid on vacancies in freight service. But the black train porters were not permitted to transfer any portion of their seniority to any other craft, and were only offered jobs in other crafts starting at the bottom of the seniority ladder. Thus, for example, even though a train porter had thirty years of experience, including substantial experience performing head-end braking duties on

passenger trains, he was offered a position as a brakeman junior in seniority to all other brakemen, including those who might have been hired only a few weeks earlier.

This discrimination was evident not only in the rehiring procedure offered by Frisco, but was bound to continue until the death or retirement of all of the black train porters who were transferring to brakeman. "Every time a Negro worker hired under the old segregated system bids against a white worker in his job slot, the old racial classification reasserts itself, and the Negro suffers anew for his employer's previous bias." *Local 189, United Papermakers and Paperworkers* v. *United States*, 416 F.2d 980, 988 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970). Where an employer's current policy serves to perpetuate the effects of past discrimination, "although neutral on its face, it rejuvenates the past discrimination in both fact and law regardless of the present good faith." *Marquez* v. *Omaha District Sales Office, Ford Division of Ford Motor Co., supra*, 440 F.2d at 1160; *see Parham* v. *Southwestern Bell Telephone Co., supra*, 433 F.2d at 427. Therefore, "[u]nder the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices." *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 430 (1971). Barriers to employment or advancement which are artificial, arbitrary and unnecessary and cannot be justified by a showing of business necessity, must be removed where they "operate invidiously to discriminate on the basis of racial or other impermissible classification." *Id.* at 431.

The conclusion is thus inescapable that there was past discrimination by Frisco and by UTU, and its predecessor, BRT, both by contract and in practice; that the discontinuance of passenger trains by Frisco, and its refusal (or inability) to permit the train porters to carry over any part of their seniority, perpetuated that discrimination

even though Frisco changed its hiring practices relating to new employees; and that this perpetuation of the effects of this past discrimination cannot be permitted to continue absent a showing of compelling business necessity.

BUSINESS NECESSITY

> "The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." *Id.* at 431.

It is likewise apparent that a neutral policy, which is inherently discriminatory, may be valid if it has overriding business justification. *Jones* v. *Lee Way Motor Freight, Inc., supra,* 431 F.2d at 249; *see also, Local 189, United Papermakers and Paperworkers* v. *United States, supra,* 416 F.2d at 989. However, this doctrine of business necessity, which has arisen as an exception to the amenability of discriminatory practices, "connotes an irresistible demand." The system in question must not only *foster* safety and efficiency, but must be *essential* to that goal. *United States* v. *Bethlehem Steel Corp.,* 446 F.2d 652, 662 (2d Cir. 1971); *United States* v. *Jacksonville Terminal Co.,* 451 F.2d 418 (5th Cir. 1971), *cert. denied,* 40 U.S.L.W. 3511 (U.S. Apr. 25, 1972) (Nos. 71-1000, 71-1010, & 71-1014). In other words, there must be no acceptable alternative that will accomplish that goal "equally well with a lesser differential racial impact." *Robinson* v. *Lorillard Corp.,* 444 F.2d 791, 798 (4th Cir.), *cert. dismissed,* 404 U.S. 1006 (1971); *accord, United States* v. *Bethlehem Steel Corp., supra,* 446 F.2d at 662.

Although Frisco and UTU argue strenuously that the train porters should not be permitted to carry over their

seniority in bidding on braking job for safety reasons, we are not convinced that this argument is necessarily valid. Those train porters who did transfer to duties as brakemen, without seniority, were not given any special training. Their student runs were waived, and if they were able to pass the physical examination, they started right out on their new freight braking duties. Frisco conceded on oral argument that they were performing these duties satisfactorily.

As already noted, the train porters performed many braking functions while working as porters. There are some duties which are performed by freight brakemen that were not performed by the train porters. However, there was testimony that while deadheading on freights, the train porters had an opportunity to observe the freight brakemen in the performance of these duties, so they have at least had the opportunity to learn by observation; and there is nothing in the record to indicate that the train porters are incapable of learning these additional duties if Frisco offers them adequate training.

At the present time, Frisco has no "line of progression." It is not necessary for a brakeman to perform one type of braking service prior to bidding on another type, if he has enough total seniority as a brakeman. Conceivably, a brakeman can go right from braking in the yards to through freight work, if he is willing to work long enough in the yards before bidding on through freight. After completion of the initial student runs, and after passing the brakeman's examination, seniority takes over as the sole criteria in bidding on a particular braking assignment. Length of service becomes synonymous with qualified. This craft seniority system, as applied to the facts of this case, perpetuates racial disparity and it cannot be justified on the basis of business necessity, since there exists a nondiscriminatory alternative means of determining qualifications.

"The Act imposes upon employers—with the assistance and cooperation of labor representatives—an affirmative duty to devise and implement pertinent objective criteria for determining what applicants for promotion or transfer are qualified to fill particular vacancies." *United States* v. *Jacksonville Terminal Co., supra,* 451 F.2d at 453.

It is true that Frisco could not have permitted a transfer of train porter seniority to the brakemen's roster without breaching its agreement with UTU, but "[t]he rights assured by Title VII are not rights which can be bargained away—either by a union, by an employer, or by both acting in concert. Title VII requires that both a union and employer represent and protect the best interests of minority employees." *Robinson* v. *Lorillard Corp., supra,* 444 F.2d at 799; *see also, United States* v. *Hayes International Corp.,* 456 F.2d 112, 117, 118 (5th Cir. 1972); *United States* v. *Jacksonville Terminal Co., supra,* 451 F.2d at 454-455. The UTU is not immune from the duties imposed by Title VII; it is a party to this action, and it will have to accommodate itself to revisions in its contracts and its rules and regulations which may be necessary to assure compliance with the Act.

Frisco's abdication, to the union, of control over the qualifications of its brakemen to perform particular braking duties, cannot now be used as a reason for denying fair treatment to the train porters under the guise of safety. Safety can be assured in other ways far more certain and practical than those inherent in the craft seniority system, and we feel confident that the trial court, acting within the general guidelines provided herein, will be able to fashion a remedy which will not only assure the safety of the public and employees of Frisco, but will also accord to qualified train porters their "rightful place" as brakemen.

REMEDY

In determining an appropriate remedy, courts possess wide discretion in fashioning decrees to insure compliance with the Civil Rights Act of 1964. *Parham* v. *Southwestern Bell Telephone Co., supra,* 433 F.2d at 428; *see United States* v. *Ironworkers Local 86,* 443 F.2d 544, 553 (9th Cir.), *cert. denied,* 404 U.S. 984 (1971). What we seek, of course, is a reasonable alternative that will eliminate or reduce the effects of past discrimination, as well as protect safety and efficiency.

The Government seeks a complete merger of the crafts, or in the alternative to require Frisco to permit qualified black train porters to bid on future vacancies in freight braking jobs as they become available, and to exercise in those jobs their total company seniority for all future purposes for which resort to seniority would customarily be made. This alternative remedy has been referred to as "rightful place" relief, while the complete and immediate merger of crafts has been referred to as "freedom now" relief. *See* Note, *Title VII, Seniority Discrimination, and the Incumbent Negro,* 80 HARV L. REV. 1260, 1268-1269 (1967). The Government also seeks back pay equal to

> "the difference between what the member of the class received as a Train Porter, or from other employment if his position as Train Porter had been abolished, and what he would have received as a Brakeman, from July 2, 1965 to such time as he is allowed to use his Train Porter seniority to bid on and secure a job as a freight Brakeman (or until the date he voluntarily retired or became physically unable to perform as Brakeman)."

Frisco and UTU urge that no relief be granted, and have suggested no alternative remedies even though they were specifically requested to do so by this Court.

At its earliest convenience, the trial court shall determine the ambit of the class,[10] and take additional evidence pertaining solely to the remedy to be fashioned. Based upon that additional evidence, and using the guidelines hereinafter set forth, the trial court shall then fashion a remedy which will accord the train porters their "rightful place" as Frisco brakemen, while making certain Frisco will not be required to hire or assign any former train porter who is not physically able, or not qualified, to perform the braking job to which he seeks to be assigned.

The general guidelines to be used in fashioning this remedy are as follows:

I. Frisco must offer to employ all of the former train porters as brakemen within six months from the date the trial court's decision becomes final. The trial court shall determine or approve the means by which the train porters are notified of their right to employment as brakemen and the means by which they must accept.[11] Frisco may be permitted to offer all of the jobs at one time or as vacancies become available, in which event offers shall be made in the order of the porter's accumulated train porter seniority. No other new brakemen may be hired during this period, until after all former train porters have been given the opportunity to return to work as brakemen. Each former train porter must pass the physical examination presently being given to brakemen of the same age. And if any former train porter declines the offer to return to work as a brakeman, when offered, fails to report for

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[10] The court shall determine which of the fifty-two train porters, *supra* n.6, are entitled to affirmative relief in accordance with this decision. It shall not automatically exclude those train porters who had been furloughed by Frisco prior to July 1, 1965, but remained on the train porter seniority roster.

[11] For example, all train porters may be notified and required to express interest within a reasonable set period. *See United States* v. *Central Motor Lines, Inc.*, 338 F.Supp. 532, 562 (W.D. N.C. 1971).

work within a reasonable time after accepting the offer, or fails the physical examination, he shall forfeit all right to return to work as a brakeman.

II. Frisco shall create and implement a training program for former train porters and make every reasonable effort to train them to perform those braking functions which they will be required to perform, on jobs they will be entitled to bid into and hold, after applying the seniority carryover hereinafter specified. Former train porters presently employed as brakemen by Frisco shall not be required to participate in this training program.

A. Frisco shall provide such instructive and safety related training as is necessary and reasonable under the circumstances for a period to be determined by the trial court, but in any event it shall not exceed six months from the date the former train porter enters into service. Upon the completion of that training program, Frisco shall determine, using reasonable, safety related, objective standards which shall be subject to the approval of the trial court, whether or not the former train porter is qualified[12] to be a brakeman, and if so whether there is any particular type of braking duty which the former train porter should not perform for safety reasons. During this training period, the former train porters shall be paid on the same scale as newly hired brakemen, and they may not use the carryover seniority hereinafter specified in bidding on assignments.

B. If, after completion of the training program, a former train porter is determined to be completely un-

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[12] It should be remembered that "qualifications" means the capacity to perform rather than the possession of "immediately marketable skills." Gould, *Seniority and the Black Worker: Reflections on Quarles and Its Implications*, 47 TEX. L. REV. 1039, 1054 (1969). A screening process could be created by which these qualifications are determined and those bidding into particular jobs are evaluated. *See e.g., United States* v. *Jacksonville Terminal Co., supra,* 451 F.2d at 459.

qualified, he shall not be entitled to carry over any past seniority credit, and he shall be subject to all contracts and rules presently in effect, giving the company the right to terminate the services of unqualified brakemen. Until such time as all former train porters, who accept the offer to return to work and pass their physical examination, have completed their training and have been determined to be qualified or unqualified, the same rules relating to training and determination of qualifications shall be applied to all newly hired brakemen as are applied to the former train porters. Once the training program for former train porters has been completed, Frisco may abandon this training program.

III. Once the training program of a former train porter has been completed, and he has been determined to be qualified, or qualified for certain assignments but not others, that former porter shall be entitled to seniority credit as a brakeman for 100% of the time spent in training plus 50% of his former seniority as a train porter.[18] Former train porters presently in service as brakemen shall be entitled to seniority credit as brakemen for 100% of the time they have spent as brakemen plus 50% of their former seniority as train porters. This seniority may then be used for all purposes for which brakeman seniority is presently used, except it shall not be used to force Frisco to assign a former train porter to a job for which he has

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[18] The figure of 50% carryover seniority takes into consideration: a) the percentage of time spent by the train porters in performing braking duties, and the disputed testimony relating thereto; b) the fact that some train porters may have preferred the work of train porter to the work of a brakeman; and c) the fact that blacks were illegally denied the right to become brakemen from 1928 until 1966. No mathematical equation is possible in such circumstances, and this Court has reached this figure in an effort to accord the former train porters their "rightful place" on the brakeman's seniority roster once they have been found to be qualified to be brakemen. *See e.g., Carter* v. *Gallagher*, 452 F.2d 315, 331 (8th Cir.) *cert. denied*, ... U.S. ... (May 22, 1972) (No. 71-1265), where this Court also adopted a percentage type remedy.

been properly determined to be unqualified, and it shall not be used to force Frisco to assign more than one former train porter to any one crew.

IV. No back pay will be awarded. In reaching this decision, we have taken into consideration the fact that the train porters (and the Government) took the position that a complete merger of the two crafts was required with full seniority carryover. Since this demand has been denied by this Court, it cannot be said that Frisco acted in bad faith or erred in refusing to voluntarily grant that request. Moreover, it would be impossible to determine on what date those train porters who are now physically unqualified to become brakemen, became physically unable to perform.

Reversed and remanded for further proceedings consistent with this opinion.

MATTHES, Chief Judge, with whom LAY, HEANEY, and BRIGHT, Circuit Judges, join, concurring.

After careful deliberation, I feel constrained to join the opinion of the Court. However, in doing so, I state some of my views separately.

First, the record in this case amply demonstrates that prior to the effective date of the Act, appellees maintained racially discriminatory hiring practices. This is established not only by the well settled legal principle that statistical evidence of racially imbalanced hiring proves discrimination, but also by the evidence that appellees contractually agreed to hire only white applicants and that black applicants were either refused employment because of their race or applied only to be porters because of this hiring policy. *See* footnote four of the majority opinion.

Second, Frisco's present seniority system violates Title VII by perpetuating the vestiges of these discriminatory

hiring practices. Blacks have no seniority as brakemen largely because they were denied jobs as brakemen due to their race.

Third, a violation of the Act having been shown, the porters are affirmatively entitled to some form of relief. The only question remaining for decision is what, if any, remedy is appropriate.

I agree with the Court that merger is not an appropriate remedy in this case. Were the porter and brakemen crafts functionally identical as were those local unions which various courts have merged, this remedy might be appropriate. But since the crafts are not functionally identical, the Court cannot assume that *all* porters are qualified to be brakemen. Hence, the defense of "business necessity," which in this case means safety of co-workers and the general public, precludes an order that Frisco merge the crafts and thereby hire all porters at whatever job their accumulated seniority would warrant.

Conversely, I cannot agree with the District Court that the only possible remedy in this case is that which Frisco has voluntarily undertaken, to wit: giving porters preference in hiring as brakemen, but denying them all seniority. Since it is the denial of seniority which constitutes the violation, that view implicitly concludes that no remedy is here possible because *no* porter is capable of handling *any* brakemen job above the entry level. However, that conclusion, is rebutted by the record in this case. Frisco concedes it has absolutely no criteria which limit promotions to qualifications. Thus, a brakeman who prefers the regular hours of yard work can pass up intermediate jobs and after accumulating seniority can "leapfrog" to rear-end brakeman or conductor on through-freights. Similarly, Frisco concedes that the porters it has hired are adequately performing their duties despite the fact that due to their lack of seniority they are relegated to the most difficult and dangerous work. Consequently, I cannot say

"business necessity" requires stripping all porters of all seniority.

Furthermore, I think a remedy fashioned within the guidelines enumerated in the majority opinion will adequately and equitably remedy the violation. By requiring preferential hiring and some training, the Court remedies the lack of jobs and lack of experience which resulted from the discriminatory hiring. By allowing Frisco to limit porters' job-range upon objective criteria and to limit former porters to one per crew, the business necessity consideration of safety should be adequately satisfied.

Finally, I am unpersuaded by the reverse discrimination argument in this case. While the Act prohibits giving any racial preference, it expressly permits requiring affirmative remedial action. 42 U.S.C. §2000e-5(g). The Court's remedy conforms to that mandate. Contrary to the District Court's conclusion, the porters are to be granted carryover seniority not "because of the color of their skin" but because they have heretofore been denied seniority because of the color of their skin. If that affirmative relief works to frustrate the seniority expectations of some incumbent brakemen, it will only be frustrating expectations which would not exist but for the discrimination which is finally being redressed. *United States* v. *Bethlehem Steel Corp.*, 446 F.2d 652, 663 (2nd Cir. 1971). In the final analysis, allegations of reverse discrimination contend only that the hardships accruing from past wrongs should continue to fall exclusively upon those already discriminated against. The answer to that contention is self-evident.

I concur in the judgment and opinion of the Court.

HEANEY, Circuit Judge, with whom LAY, Circuit Judge, joins, concurring in part and dissenting in part.

We concur in Sections I, II, and III of the majority opinion, and with all of Section IV thereof, except that

portion relating to back pay. In our view, the District Court should be required, on remand, to fix damages for those porters who suffered loss of earnings because of the discriminatory activities complained of.

Back pay as a form of relief is specifically authorized by Section 706(g) of Title VII. Courts have commonly awarded back pay.[1] While Section 706(g) gives the District Court discretion in fashioning relief, Congress clearly intended that the authority to award back pay "should be broadly read and applied so as to effectively terminate the practice and make its victims whole." *Bowe* v. *Colgate-Palmolive Company*, 416 F.2d 711, 721 (7th Cir. 1969). The interpretative memorandum on Title VII, prepared by Senators Clark and Case, 110 Cong. Rec. 7212 (1964), explicitly states that Title VII remedies are to include familiar N.L.R.A. remedies, including back pay. In light of the frequency with which back pay awards are approved in labor cases, this legislative declaration should not be taken lightly.

The majority opinion states that the porters should be denied back pay because the company did not act in bad faith. But good faith should make no difference, since "back pay is not a penalty imposed as a sanction for moral turpitude; it is compensation for the tangible economic loss resulting from an unlawful employment practice." *Robinson* v. *Lorillard Corporation*, 444 F.2d 791, 804 (4th Cir.), *dismissed pursuant to Rule 60*, 404 U.S. 1006 (1971).

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[1] See: *Sprogis* v. *United Air Lines, Inc.*, 444 F.2d 1194 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971); *Robinson* v. *Lorillard Corporation*, 444 F.2d 791 (4th Cir.), *dismissed pursuant to Rule 60*, 404 U.S. 1006 (1971). See, *e.g.*, *Tidwell* v. *American Oil Company*, 332 F.Supp. 424 (D.Utah 1971); *Fillinger* v. *East Ohio Gas Co.*, 4 E.P.D. ¶7618 (N.D.Ohio, Aug. 17, 1971); *U.S.* v. *Lathers, Local 46*, 3 E.P.D. 6833 (S.D.N.Y. 1971); *Gregory* v. *Litton Systems, Inc.*, 316 F.Supp. 401 (C.D.Cal. 1970); *Pettway* v. *American Cast Iron Pipe Co.*, 4 E.P.D. ¶7651 (N.D.Ala., Mar. 18, 1970).

Furthermore, back pay should not be denied because it is difficult to compute the sum that each porter is entitled to. District Courts have commonly been called upon to perform equally difficult tasks which they have carried out wisely.

STEPHENSON, Circuit Judge, with whom VAN OOSTERHOUT, Senior Circuit Judge and MEHAFFY, Circuit Judge, join dissenting.

We would affirm on the basis of Judge Harper's well-considered opinion which is reported at 52 F.R.D. 276 (E.D. Mo. 1971). We are satisfied that the trial court's findings of fact are supported by substantial evidence and that the law has been correctly applied.

Neither the anti-preference section (§ 2000e2(j)) nor the provision safeguarding seniority systems (§ 2000e-2 (H)) operate to prevent courts from eliminating present discriminatory effects of past descrimination which is preserved through the use of neutral employment policies. *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971); *United States* v. *Bethlehem Steel Corp.*, 446 F.2d 652 (CA2 1971); *Parham* v. *Southwestern Bell Telephone Co.*, 433 F.2d 421 (CA8 1970); *United States* v. *Sheet Metal Workers Int'l Ass'n, Local 36*, 416 F.2d 123 (CA8 1969) and *Local 189, United Papermakers and Paperworkers, AFL-CIO, CLC* v. *United States*, 416 F.2d 980 (CA5 1969). See Note, Title VII, Seniority Discrimination And The Incumbent Negro, 80 Harv. L. Rev. 1260 (1967). It is equally clear, however, that courts, with their broad authority to fashion remedies under the Act should not emasculate valid seniority systems so long as they are conceived out of *business necessity* and not out of racial discrimination. *Local 189, supra*, at 989, 993-994; *Whitfield* v. *United Steelworkers of America, Local 2708*, 263 F.2d 546 (CA5 1959) and *United States* v. *H. K. Porter Co.*, 296 F.Supp. 40, 66-68 (N.D. Ala. 1968). See Note, Employment Discrimina-

tion and Title VII of the Civil Rights Act of 1964, 84 Harv. L. Rev. 1109 (1971); Kovarsky, Current Remedies for the Discriminatory Effects of Seniority Agreements, 24 Vand. L. Rev. 683 (1971) and Yaeger, The "Unqualified" Minority Worker, 59 Geo. L. J. 1265 (1971). *Cf. Griggs, supra.*

A careful review of the record convinces us the findings of the district court preclude reclassification of the train porters as freight brakemen with carry-over seniority. Not only is there a functional difference between the crafts of train porters and brakemen, but Frisco's seniority system is based on a recognition that a brakeman's job is complex and hazardous, requiring related experience in safety and repair work at the various levels of job progression. Reclassification with carry-over seniority, under these circumstances, could occur only at the expense of safety and efficiency.[1]

Litigation involving the train porters and their economic status has been before this Court almost continuously since 1946.[2] A review of this litigation discloses that although these blacks and their predecessors were originally locked into the train porter craft by joint Frisco-Union discriminatory practices, their plight in the last two decades has been predominantly economic in origin. The advent of the diesel engine, the dramatic decline of the railroad industry and the elimination of passenger service in 1967 all have combined to wreck havoc upon train porters, rendering them virtually an extinct occupational species.

The majority opinion in effect directs a merger of the crafts, albeit the results of a complete merger are tempered by "minimum qualifications" and "50% seniority." This

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[1] See *United States* v. *Jacksonville Terminal Co.*, 451 F.2d 418, 443-448 (CA 5 1971).

[2] See *United States* v. *St. Louis-San Francisco Railway Co.*, 52 F.R.D. 276 (E.D. Mo. 1971) (cases cited at 277-278).

remedy destroys a valid senority system based on functional distinctions, a result which appears to us is not contemplated by the Act. In addition it obviously creates a climate for endless litigation.

VAN OOSTERHOUT, Senior Circuit Judge, dissenting.

I dissent from the majority opinion upon all issues except the determination at division IV which holds that no back pay will be awarded. I base my dissent on the dissenting opinion prepared by Judge Stephenson and upon the following additional observations.

Judge Harper points out at pp. 284-85 of 52 F.R.D. that Frisco's employees, by reason of the diesel engine and other technology advancements and the discontinuance of passenger and other services, have been reduced from 28,000 to 8,000, and that many employees have suffered from the decline of employment. He properly determined that Negro train porters have not been discriminated against since the enactment of the Civil Rights Act and that the elimination of their jobs was caused by the authorized termination of passenger service. See *Howard v. St. Louis-San Francisco Ry. Co.*, 8 Cir., 361 F.2d 905, 907-908.

Judge Harper appropriately observes:

> "If this court were to grant the proposed relief, it would place the Negro train porters in a favored position only because of the color of their skin. The craft system has always been present within the raliroad industry. When freight brakemen positions were eliminated by the diesel engine, the brakemen could not bid on the train porter positions regardless of the seniority they possessed. Now, the court is confronted by the reverse situation. In effect, the train porters seek superseniority. Such is not the intent of the Civil Rights Act." 52 F.R.D. 276, 285.

The Supreme Court in *Brotherhood of Railroad Trainmen* v. *Howard*, 343 U.S. 768, decided in 1952, enjoined discrimination against employment of Negroes by reason of race. It cannot be fairly assumed that the railroad would continue to discriminate in violation of the injunction. I find no substantial evidence of any discrimination since 1952. In a subsequent action, *Howard* v. *St. Louis-San Francisco Ry. Co.*, supra, at p. 911 of 361 F.2d, we accept the District Court's finding of absence of discrimination stating: "The record fails to establish a pattern of discrimination, or collusive action between Frisco and Brotherhood."

I find no substantial evidence in the record which reflects that any of the train porters applied for or were denied brakemen's positions.

There is substantial evidence that the train porter's position was a less hazardous and less burdensome job than that of brakemen and carried regular and more desirable hours. Judge Harper points out:

> "The record indicates that some Negro train porters preferred assignments to the train porter craft, for in the train porter craft the train porter was not subject to the physical labor that the brakemen performed at the freight level. The testimony of train porters Howard (Deposition pp 34-5) and Bagley (Deposition pp 130-1) shows the above to be true." 52 F.R.D. 276, 284.

Train porters who as a matter of free choice sought train porter positions and who made no effort to apply for a brakeman job are not entitled to an artificial seniority which will disrupt the long existing brakemen's seniority system.

Judge Harper on the basis of the evidence before him determined that Frisco went out of its way to find employment for the train porters and that Frisco on its own

accord provided the only relief that could possibly be ordered. He further properly found that granting the requested relief would inflict inequities upon the brakemen and disrupt the long-established seniority system.[1]

I would affirm the judgment of the trial court in all respects.

Judge Mehaffy and Judge Stephenson join in this dissent.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

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[1] In my view, a substantial question exists on whether Title VII of the Civil Rights Act effects a change in the long-standing uniform holdings of the courts that under the Railroad Labor Act the mediation board has exclusive jurisdiction to make class or craft composition determinations. Since this issue is not adequately briefed, or discussed in the majority opinion, I deem it inappropriate to discuss the issue.

APPENDIX B

United States of America, by Ramsey Clark, Attorney General,

v.

St. Louis-San Francisco Railway Co.

and

United Transportation Co., Successor to Brotherhood of Railroad Trainmen.

No. 67 C 243(A).

United States District Court
E. D. Missouri, E. D.

March 9, 1971

Memorandum and Order

Harper, District Judge.

Invoking Title VII of the Civil Rights Act of 1964 (42 U.S.C.A., § 2000e et seq.), the United States charged the St. Louis-San Francisco Railway Company (hereinafter referred to as Frisco) and the Brotherhood of Railroad Trainmen (hereinafter referred to as Brotherhood) with having engaged in a "policy and practice" of discrimination against Negroes on account of their race. The amended complaint contains several allegations of discrimination. However, at the pre-trial conference the parties agreed to limit the issue to the alleged racial discrimination against the craft formally known as train porters.[1] The plaintiff contends that the Negro train

[1] Passenger service was terminated by Frisco in 1967. Thereafter, the train porters craft was not recognized by Frisco.

porters performed the same substantial duties as those duties performed by their alleged white counterparts, the railway brakemen. The plaintiff then avers that the train porters were artificially classified as porters and not brakemen due to their Negro race. They maintain that the above unlawful classification of train porters was established by Frisco and was perpetuated by Brotherhood. As a result of this alleged racially discriminatory practice, the negro train porters have been denied equal employment opportunities, advancement and compensation as compared to the white brakemen. The plaintiff, under Title VII of the Civil Rights Act, seeks to have this court reclassify the former train porters as brakemen and to have former train porters carry over their seniority into the brakemen craft.

This case represents but another segment in the never ending encounters between the Negro train porters and the brakemen. The first case was commenced in 1946, Howard v. Thompson, 72 F.Supp. 695 (E.D. Mo. 1947), appealed Howard v. St. Louis-San Francisco Railway Co., 191 F.2d 442 (8th Cir. 1951), and reviewed on grant of certiorari in Brotherhood of Railroad Trainmen v. Howard, 343 U.S. 768, 72 S.Ct. 1022, 96 L.Ed. 1283 (1952); the second case was Howard v. St. Louis-San Francisco Railway Co., 215 F.2d 690 (8th Cir. 1954); and the third case was Howard v. St. Louis-San Francisco Railway Co., 244 F.Supp. 1008 (E.D. Mo. 1965), appealed Howard v. St. Louis-San Francisco Railway Co., 361 F.2d 905 (8th Cir. 1966), cert. den. Howard v. St. Louis-San Francisco Railway Co., 385 U.S. 986, 87 S.Ct. 598, 17 L.Ed.2d 448 (1966). The problem also has been dealt with in Nunn v. Missouri Pacific Railroad Co., 248 F.Supp. 304 (E.D. Mo. 1966); and in Norman v. Missouri Pacific Railroad Co., 414 F.2d 73 (8th Cir. 1969). This court takes judicial notice of the extensive prior litigation between the train porters and the brakemen.

The craft of train porters was recognized by Frisco from 1918 until 1967. For a number of years prior to their elimination by Frisco, the train porters were represented by the Association of Railway Trainmen and Locomotive Firemen. The duties performed by the train porters were only on passenger trains and consisted of passenger-assistant tasks and some braking work on the head end of passenger trains. The craft known as brakemen was represented for years by the Brotherhood of Railway Trainmen.[2] The brakemen craft performed braking duties on both passenger and freight trains. There were only a very small number of Negroes in the brakemen craft when the Civil Rights Act was passed.[3] Also, it is undisputed that Frisco has always dealt separately with the unions that represent the various crafts of which there were some eighteen.

In Brotherhood of Railroad Trainmen v. Howard, supra, the Supreme Court prohibited the brakemen union from forcing the Railroad by means of a threatened strike to discontinue the train porter jobs and replace them with brakemen. The Supreme Court held: First, the brakemen's union is prevented by the Railway Labor Act from eliminating Negro train porter jobs in favor of brakemen; second, the reclassifying of train porters as brakemen is committed by the Railway Labor Act to the National Mediation Board. In Howard v. St. Louis-San Francisco Railway Co., 361 F.2d 905 (8th Cir. 1966), the train porters sought to be classified as brakemen. In denying relief, the Court of Appeals followed the decision of the Supreme Court in *Howard*, supra, and held that the

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[2] In 1969, the United Transportation Union succeeded to and assumed the rights and obligations of the Brotherhood.

[3] In 1928, Frisco entered into an agreement with the Brotherhood which excluded Negroes from being employed in train, engine or yard service, except as train porters. This agreement was rescinded in 1949.

district court had no jurisdiction to reclassify or place the craft of train porters into the craft of brakemen. In substance, the train porters' last complaint and this cause of action commenced by the United States are the same. The record in this case reveals that the reason this suit was instituted was the fact that the courts held against the train porters in 244 F.Supp. 1008; 361 F.2d 905; and 385 U.S. 986, 87 S.Ct. 598, 17 L.Ed.2d 448. In both instances the plaintiffs maintain that the train porters performed the essential duties of a brakeman, and that Frisco has refused to classify them as such because of their Negro race. This problem had never been presented under the Railway Labor Act. The present litigation does, however, differ in two respects from the past case on this subject: First, this action is commenced by the United States and not a private individual, and second, this action is brought after the enactment of the Civil Rights Act of 1964. In the *Howard* cases the courts have uniformly held they have no authority to reclassify crafts under the Railway Labor Act. However, the factual allegations within the plaintiff's amended complaint allege a racially inherent discriminatory practice that the plaintiff contends is expressly prohibited by Title VII of the Civil Rights Act.

[1] Frisco and Brotherhood raise the following affirmative defenses: Res judicata, collateral estoppel, and the failure to join indispensable parties. All of these defenses are rejected by this court. The defenses of res judicata and collateral estoppel must be viewed in terms of the Civil Rights Act of 1964, and in particular, Title VII, § 703(a)(2) and § 703(c)(2) (42 U.S.C.A., § 2000e-2). The pertinent portions of this part of the Equal Employment Opportunity Act provide:

> "Section 703(a) It shall be an unlawful employment practice for an employer—

"(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

"Section 703(c) It shall be an unlawful employment practice for a labor organization—

"(2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or"

The factual allegations of this complaint are in part similar to those expressed in Norman v. Missouri Pacific Railroad, supra. There, as in this case, the complaint alleges racial discrimination by the unlawful refusal of a railroad company to classify the train porters as brakemen. It is contended that the above refusal denied to the train porters a higher rate of compensation and advancement. In *Norman*, the Eighth Circuit Court of Appeals considered the *Howard* cases, and then rejected the Railroad's position that the prior refusal to classify train porters as brakemen operated as a bar to the present action. The court stated, 414 F.2d at 84:

"[T]he train porters in a class action contended that they were relegated to the class of train porters solely because of race. We stated at 906 of 361 F.2d that the District Court 'failed to find hostile racial discrimination.' We viewed the issue on appeal as whether 'the District Court has jurisdiction and

power, to require by appropriate order, that all Negro employees of Frisco, now in the craft or class of train porter, be placed in the craft or class of brakemen.' Id. Both of these cases were viewed within the context of jurisdictional disputes or craft classifications constituting grievances solely cognizable under the Railway Labor Act. *The applicability of Title VII of the Civil Rights Act to the plaintiffs' complaint has not been decided by the courts. We hold, that Nunn and Howard are not a bar to the present action.*" (Emphasis added.)

The court in *Norman* expressly recognized that Title VII of the Civil Rights Act of 1964 may provide additional statutory relief for an individual even when the industry is subject to the Railway Labor Act. In considering both of the above acts, the court stated at 82-83:

"* * * The Railway Labor Act is not basically a fair employment practice act nor has it been utilized as such. Its basic purpose is to foster and promote collective bargaining between employees and employers with a provision for continuity of service to the public while setting up a detailed and elaborate procedure for the resolution of major and minor disputes that occur in the operation of the railroads. On the other hand Title VII of the Civil Rights Act specifically prohibits racial and other discrimination in employment and employment opportunities.

This court in Bremer v. St. Louis Southwestern Railroad Company, 310 F.Supp. 1333, at page 1339 (E.D.Mo. 1969), followed *Norman*, supra, and stated with regard to an allegation of discrimination:

"Prior to the enactment of the Civil Rights Act of 1964, disputes of this nature were unquestionably solely within the province of the Railroad Adjustment

Board. Title VII of the Act has created an additional remedy, without eliminating the prior one, and plaintiff has stated a cause of action under the Act."

Thus, in the light of the above cases, the allegations of the plaintiff are not barred by either res judicata, or, in the alternative, collateral estoppel.

[2] Frisco and Brotherhood also sought to dismiss this complaint for the failure of the plaintiff to join those persons employed by Frisco as brakemen whose seniority rights could be affected by the requested relief. It is the position of the defendants that the brakemen under Rule 19, Federal Rules of Civil Procedure, as amended, are indispensable parties to this action. This contention is without merit. As stated by the court in *Norman*, supra, 414 F.2d at 85: "[E]ven contract rights such as seniority may be modified by public policy or by changes in law." The Brotherhood is fully capable of representing the interest of its members. Thus, the joinder issue as raised by the defendants is lacking in merit.

[3] Turning to the case on its merits, basically the court is called upon to decide two issues: (1) Should the members of the train porter craft be declared members of the brakemen craft and given seniority in the brakemen craft based on their seniority in the train porter craft; and (2) Has Frisco engaged in the policies and practices of discrimination against employment of Negroes as brakemen since the passage of the Civil Rights Act?

The plaintiff cites many cases to support its request for carryover seniority. However, only Local 189, United Papermakers & Paperworkers, etc. v. United States, 416 F.2d 980 (5th Cir. 1969) cert. den. 397 U.S. 919, 90 S.Ct. 926, 25 L.Ed.2d 108 (1970), and Quarles v. Philip Morris Incorporated, 279 F.Supp 505 (E.D.Va.1968), permitted the merging of seniority units in order to eliminate the present effects of past discrimination. Both *Local 189*

and *Quarles* expressly condition their policy upon the court's finding that maintaining of the respective units were not essential to business necessity. In *Local 189*, the court stated at 989 of 416 F.2d:

> "• • • *The record supports the district court's holding that job seniority is not essential to the safe and efficient operation of Crown's mill.* The defendants' chief expert witness, Dr. Northrup, made it clear that he considered mill seniority 'disastrous' only to the extent that it allowed *all* men in a slot to bid on the basis of their time at the mill. He stated that mill seniority in that sense would create labor unrest because its main effect would be to allow whites to 'jump' other whites and Negroes to 'jump' other Negroes."

The defendants contend that carryover seniority is precluded by business necessity. In United States v. H. K. Porter Company, 296 F.Supp. 40 (N.D.Ala.S.D. 1968), the court held that legitimate operational considerations may preclude the merger of independent units. In the *Porter* case the court stated at 67:

> "• • • On the other hand, based on the evidence which it has heard on the point, the court finds that the requisite skills and abilities differ in substantial measure from department to department, that satisfactory job performance in one department is not an accurate predictor of satisfactory job performance in another department, and that the departmental structure of this plant is in fact based on the particular and distinctive type of work performed by each of the departments."

The above mentioned cases are not in conflict. The cases uniformly hold that business necessity precludes merger. The Fifth Circuit Court of Appeals in *Local 189, supra*, at page 993 of 416 F.2d, said:

"In other words, the record in that case, as the district court viewed it, showed that safety and efficiency, the component factors of business necessity, would not allow relaxation of the job seniority system. We see no necessary conflict between *Porter's* holding on this point and our holding in the present case."

The resolution of the court's first issue necessitates a review of the duties of a train porter and those of a brakeman.

In beginning a determination of the classification issue, this court is confronted with extensive prior litigation between the train porter and brakeman crafts. A review of the *Howard* cases leaves unanswered the essential duties that a train porter and brakeman performed. Moreover, it is equally apparent from an examination of the *Howard* cases that the respective courts have never considered if a distinction exists between the duties of a passenger brakeman and those duties performed by a freight brakeman. It would appear that the past *Howard* cases dealt at most only with the difference between the train porter and a passenger brakeman. With the termination of passenger service in 1967, the position of passenger brakeman was eliminated. Since the plaintiff's requested relief seeks reclassification and carryover seniority for the train porters, this court must determine if the train porter possesses the requisite skills and abilities in the freight brakeman's craft based on the record in this case.

The plaintiff maintains that the former train porters perform the same essential braking duties on the head end of passenger trains as those performed by the brakemen on both passenger and freight trains. Several of the train porters stated in their depositions that ninety-five percent of their duties consisted of braking duties. From a review of the credible evidence in the record, this percentage estimate is without a basis and is hereby rejected by this court.

Mr. Falls, a former train porter, and a witness for the plaintiff, stated in his deposition (pp 21 through 24) that he performed the following duties as a train porter: Looked after and checked on the lighting, heating and air-conditioning on passenger trains; kept up the general appearance of the passenger coaches by picking up debris, bottles, cups, and sweeping the aisles and under the seats; assisted passengers boarding and department from trains; helped passengers with their baggage, called out train stations, advised them with respect to making connections, and answered any remaining questions the passengers might have; picked up hatchecks for the passengers; sold pillows to the passengers; kept the restroom on the passenger trains clean; and checked for items the passengers may have left behind after the passengers departed the train. The testimony of the other train porters also indicates that they performed the above mentioned duties.

At the trial, Nelson Burton, a former train porter, and a witness for the plaintiff, testified that in addition to those duties listed by the witness Falls, he also took meal orders and prepared accident reports on any passengers who might be injured. Mr. Brookshire, a brakeman and a witness for the plaintiff, testified that the primary duty of a train porter was to assist and care for the train passenger. Train porter Howard, who in 1914 was hired by Frisco as a freight brakeman after passing tests, and later requested and was granted a transfer to the train porter craft (Deposition pp 36-38), testified that he was on many occasions reprimanded in connection with his handling and taking care of passengers. The evidence presented by the plaintiff in itself establishes that the primary function of a train porter was that of providing for the care and comfort of the passengers.

The defendants maintain that the craft division between train porters and brakemen is based upon functional differentiations. From a review of the record, it is evident

that the duties of a train porter are essentially different from those duties performed by either a passenger or freight brakeman.

The record discloses that the average brakeman begins his employment in the yards or on *local* freight, progresses to *through* freight, and then prior to 1967 might after many years advance to *passenger* trains. The witnesses Burst and Wilson, brakemen for Frisco, testified that freight work involves long hours, irregular working schedules, and much physical labor. The physical labor consists of switching cars, kicking cars, working handbrakes, repairing mechanical difficulties, and loading and unloading train goods. In addition, Burst, Wilson and McClellan stated that the repair of train equipment was a major problem on freight trains only. This was due primarily to the length of freight trains. The repair work on the freight trains includes: Fixing air hoses, replacing broken knuckles (or train couplings), repairing brake beams, and other train equipment. While the record discloses that the train porter did minimal switching work and other minor duties of a brakeman, it is unmistakably clear from the testimony of plaintiff's own witness (Brookshire) that such duties were only performed on rare occasions, and such consisted of throwing switches and flagging blocks. There is no testimony of any train porter repairing train equipment such as a freight brakeman repairs.

The plaintiff, mainly likens the train porter to the passenger brakeman. Although the duties of these two former positions are different, the position of the plaintiff overlooks the many years of seniority that the brakeman had to acquire at the freight level before securing the passenger brakeman position. Mr. Wilson testified that he spent the better part of twenty years working irregular shifts at the freight level.

W. W. Francis, a former brakeman, a supervisor of brakemen, and presently a personnel officer of *Frisco,*

testified that the primary duty of a train porter was to look after and care for the comfort of the passengers. Francis stated that the train porter was not qualified to be a freight brakeman as the train porter had utterly no experience on freight trains. The train porter performed some minor duties of a brakeman on occasion, but for the most part the train porter did not possess experience in moving, switching, braking and kicking freight cars, nor in making train repairs. Experience was essential in order to insure safety and efficiency. Moreover, the train porter had no familiarity with switch lists. Mr. Francis noted that experience and initiative are essential to the freight brakeman as trains were longer and involved a minimum amount of supervision.

H. J. Lovelady, a superintendent of terminals at Kansas City, Missouri, stated in his deposition at page 53:

> "• • • I would say primarily that (the care of passengers) was the duty of the train porter, the loading and unloading of passengers, furnishing pillows at points, and I guess change diapers if anybody wanted their kids changed. But primarily, care and convenience of the passengers' welfare was his job. If it was necessary, clean the floor, sweep the floor of the coach; as I say, the primary, taking care of the passengers."

C. L. Lester, a former train porter who moved to the brakemen's craft after Frisco terminated passenger service in 1967 (since that time Lester has passed his conductor's test), stated in his deposition at pages 10 and 11:

> "Q. Now, referring to your employment for the Frisco as a train porter, what run did you work on?
>
> "A. Runs 709 and 710.
>
> "Q. Now, during the course of your employment as a train porter did you also have occasion to ride

on other of the Frisco's passenger trains and observe the duties performed on those trains?

"A. Yes, I did.

"Q. Mr. Lester, was it your observation by riding those other trains, and comparing the service performed by the train porters on those trains with the service that you performed on your run, that the run that you had was the hardest run with the most stops?

"A. It was.

"Q. On the run that you were working on as a train porter on 709 and 710, Mr. Lester, what period of time was involved from beginning to end to complete that run?

"A. To begin with it was over five hours, at the ending period was around four hours and fifty minutes.

"Q. And approximately what was the mileage covered by that run?

"A. 134 miles.

"Q. Now, Mr. Lester, of the five hours or four hours and fifty minutes, whichever it took to complete your run, what was the greatest period of time that you would be occupied performing duties other than duties directly connected with the care, comfort and convenience of the passengers?

"A. About thirty minutes, average thirty minutes per day working headin.

"Q. Mr. Lester, in your experience and through your observation, being employed bp the Frisco Railroad, what was the primary purpose for the employment of a train porter on a passenger train?

"A. Well, my first instruction was that the passengers were first, the care of the passengers was first.

"Q. And is it a fact that you had many duties to perform on a run in connection with the passengers?

"A. Yes, we did."

J. K. Beshears, a former brakeman and now a vice-president of personnel at Frisco, testified that the primary duty of a train porter was passenger assistance. The view of Mr. Beshears was shared by both Mr. Brookshire, a brakeman and witness of the plaintiff, and Mr. Wilson, a brakeman.

In the opinion of this court, the record discloses that the train porter's primary duties always differed from those of any passenger brakeman or a freight brakeman. Although both the train porter and brakeman performed some braking and switching duties, this hollow comparison and attempt to equate the crafts overlooks the following factors: First, the primary duty of the train porter craft as opposed to the brakeman craft; and second, the fact that the train porters were never employed in the freight area.

There is no doubt that the train porter performed some braking and switching duties on passenger trains. However, it is equally apparent from a review of the evidence that such braking duties were minor and incidental to the train porter's primary duty of providing for the care and comfort of the train passenger. All of the former train porters elaborated on the many facets of passenger care that they were expected to perform. As passenger volume declined, the train porter's duties no doubt declined. However, the depositions of company officials, brakemen and former train porters establish that a valid functional classification did exist between train porter and brakeman. The train porter's primary concern rested with the care of the passenger. On the other hand, the passenger brakeman's responsibility rested with the safety of the trains.

In addition to the plaintiff's failure to distinguish the primary duty of a train porter and brakeman, the record discloses that the train porter has no experience in the

freight train area. The train porter has never been employed on freight trains. Moreover, the train porters were excluded from employment in the freight area by the very terms of their labor agreement with Frisco. It is evident from the record that passenger service is relatively free from equipment repair; however; the repairing of equipment is a major problem on freight trains. Also, the record reveals that the train porters have performed only some of the brakeman's duties, and only on rare occasions has the train porter performed these duties. The record reveals that a brakeman's job is a hazardous one. One mistake in switching a freight car could endanger the lives of many railroad men.[4]

From the brakeman's first day with the railroad his duties on local and through freight trains involve not only supporting the delivery of cars and the loading and unloading of goods, but also the corresponding duty of assuring train safety by checking for and repairing mechanical difficulties. Much of his work is outside in all types of weather.

The record indicates that some Negro train porters preferred assignments to the train porter craft, for in the train porter craft the train porter was not subject to the physical labor that the brakeman performed at the freight level. The testimony of train porters Howard (Deposition pp. 34-5) and Bagley (Deposition pp. 130-1) shows the above to be true. Moreover, the train porter work schedule was on a regular basis (the brakeman's work schedule was irregular at the freight level). The attempt by the plaintiff to equate the train porter craft with the brakeman craft completely ignores the experience in safety and repair work that the brakeman has obtained at the freight train level. The duties of a train porter and brakeman are essentially different.

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[4] Judicial notice of F.E.L.A. cases reveals many injuries to brakemen.

This court concludes that service as a train porter does not equip the train porter with the requisite skill and ability to perform a freight brakeman's position in either a safe or efficient manner. The crafts of train porter and brakeman are based upon functional differentiations, that is, distinctive types of work performed by each craft. Most of the members of the various crafts (age permitting) in the Railroad industry could probably with training meet the requirements of the other crafts, but the train porter's absent training does not meet the qualifications of the brakeman's craft.

As to the second issue, this court concludes that the Negro train porters have not been discriminated against since the enactment of the Civil Rights Act in 1965. A brief reference to the testimony regarding railroad industry problems will be helpful.

Mr. McClellan, a conductor for Frisco, stated that the diesel engine replaced the steam engine between 1946 and 1948. This eliminated forty to fifty percent of the freight crews. In 1967, the last two sets of passenger trains were discontinued by Frisco. Mr. Francis, a personnel officer with Frisco, informed the court that this eliminated 190 positions, of which less than ten percent were train porters. The drastic decline in railroad employment was emphasized by Mr. Beshears who is one of Frisco's vice-presidents. Mr. Beshears testified that Frisco's employment has dropped from a high of 28,000 to the present total of approximately 8,000 employees due to the diesel engine, technology advancements and the ceasing of passenger service. Many employees have suffered from the decline in employment. The figures speak for themselves. Frisco's passenger service was terminated with the approval of the Interstate Commerce Commission. If this court were to grant the proposed relief, it would place the Negro train porters in a favored position only because of the color of their skin. The craft system has always

been present within the railroad industry. When freight brakemen positions were eliminated by the diesel engine, the brakemen could not bid on the train porter positions regardless of the seniority they possessed. Now, the court is confronted by the reverse situation. In effect, the train porters seek superseniority. Such is not the intent of the Civil Rights Act.

Furthermore, it is the opinion of this court that the requested relief sought by the plaintiff is inappropriate as the anticipated collateral effects of granting carryover seniority in this case would create inequities. See United States v. Bethlehem Steel Corp., 312 F.Supp. 977, 994-996 (W.D.N.Y.1970). The granting of the requested relief would create the following inequities: First, the proposed seniority carryover remedy would disrupt the brakemen seniority system, and moreover, since promotion to conductor is based to a great extent upon freight service seniority, the remedy would alter the rightful expectations of the present members of the brakemen craft as to future promotional opportunities; and second, the proposed remedy would assure the former train porters of positions, but would overlook the railroad's history of declining employment.

This court concludes that adequate relief has already been accorded to the train porters. Mr. Francis testified with regard to the fifty-six former train porters that the plaintiff claims to be entitled to relief under this cause of action. After researching the company records, Mr. Francis noted that eighteen of the named individuals had performed no compensated service since July 2, 1965 (the effective date of the Civil Rights Act). In addition, ten of the porters were shown to have accepted retirement benefits. Of the remaining twenty-eight train porters, all but one were offered positions with the railroad in other crafts. Frisco was not able to contact the one who had

only worked part time the years before. Twelve of the train porters accepted employment in other railroad crafts. Most of these, but not all, accepted freight brakemen positions. A number of the twelve have since been promoted. The remaining fifteen train porters who were offered positions refused, and for the most part stated they had to see their lawyer (plaintiff's attorney in the last *Howard* case). Almost all of these were offered positions as brakemen.

The actions of Frisco in attempting to place these former train porters should be commended. Mr. Beshears testified that he instructed the district managers to give the train porters preference as to employment and to waive many of the normal employment requirements. These are not the facts that necessitate the use of this court's injunctive power. Unlike Local 189, United Papermakers and Paperworkers, etc. v. United States, supra, and Quarles v. Philip Morris Incorporated, supra, Frisco furnished on its own accord the only affirmative relief that this court could have ordered under the circumstances of this case. This court is cognizant of the fine efforts that Frisco has made to eliminate all taints of racial discrimination, and finds a present company policy and practice that is comparable to the company in Parham v. Southwestern Bell Telephone Company, 433 F.2d 421, at 429 (8th Cir. 1970), in which Judge Bright stated:

> "In view of this evidence, we agree with the trial court that no injunction seems necessary or appropriate in this case at the present time. Title VII aims at securing voluntary compliance with the requirements for equal employment opportunities. In enacting the Civil Rights Act of 1964, Congress placed great emphasis on private settlement and the elimination of unfair practices without resorting to the court's injunctive powers."

Frisco has acted in good faith. This merger is precluded both by business necessity and by the collateral effects the proposed remedy would have on the present and former employees of Frisco. No injunction is warranted.

This memorandum opinion is adopted by the court as its findings of fact and conclusions of law and the clerk will prepare and enter the proper order dismissing the action and giving judgment to the defendants herein.